

HUMAN SERVICES BOARD

In re) Fair Hearing No. 21,264
)
Appeal of)

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL) substantiating a report that she abused and neglected her disabled adult son, M.W. The issue is whether the petitioner's actions meet the statutory definitions of either abuse or neglect.

1. M.W. is a twenty-two-year-old severely developmentally disabled adult. He is reported to have the cognitive and communication abilities of a two-and-a-half-year-old child. He has lived with his mother in the home of his maternal grandmother for several years. He has been a special education student at the local high school for several years. The petitioner was appointed M.W.'s legal guardian by the probate court on April 26, 2006.

2. The bases of the Department's actions in this matter are set forth as follows in the Commissioner's

decision dated November 27, 2007, addressed to petitioner's attorney:

The Adult Protective Services Division received a complaint on October 30, 2006, alleging that MW, [petitioner's] son, was coming to school dirty, covered in feces, and dehydrated. The report alleged that MW lost weight after weekends at home. Also, the report claimed that MW had been overmedicated following foot surgery. The investigator found that school staff had been cleaning and redressing MW for a long time because he came to school so dirty. The staff had noticed that he lost weight over weekends and time away from school, and that [petitioner] had to be told to take him to the doctor. They also told the investigator that MW was capable of learning life skills, but that his training was not being carried over outside of school.

You provided some doctor's notes around MW's post-operative period, and you offered a chart of MW's weight from June 2006 to October 2007. You argued that the report should have been made earlier, by the school, if the situation was so bad for MW that it constituted abuse and neglect, and you noted that it couldn't have been that significant when it took seven months to finish the investigation. You suggested that the actions or inactions of [petitioner] didn't rise to abuse or neglect. You discussed the care MW receives now and the ability of [petitioner] to adequately provide for her son.

It appears that there might have been some miscommunication and tension between the school co-guardian and [petitioner]; however, I find the information from the two school staff members to be credible. I have reviewed the weight chart, which shows that MW's weight rose once in-home services were started for him this past summer. The doctor's notes indicate that [petitioner] was not properly administering MW's pain medications following his foot surgery. I believe that [petitioner] and [petitioner's mother] are now doing better caring for MW, but at the time of the complaint, I find that [petitioner's] lack of care for her son constituted abuse and neglect. Inadequately

feeding MW, sending him to school dirty and with feces caked on parts of his body, and mismanaging his pain medication are abuse under 33 V.S.A. § 6902(a)(A) and neglect under (7)(A)(i).

3. The petitioner appealed this decision on December 26, 2007. Following several continuances at the petitioner's request a hearing was held on May 22, 2008. At the hearing the Department's primary witness was the "school co-guardian" referred to in the Commissioner's decision, *supra*.

4. This individual is a special educator at the local public high school who has been M.W.'s special education case manager for the last eight years. On July 11, 2006, this individual was appointed "co-medical guardian" of M.W. by the probate court. She testified that one of M.W.'s worse behavior problems is that he compulsively tries to handle and play with his feces.

5. Based on this witness's credible testimony, it is found that the petitioner had ongoing problems from summer 2006 through spring 2007 maintaining M.W. on a recommended diet, resulting in periods of weight loss for M.W., and maintaining his hygiene, resulting in M.W. often coming to school dirty and with feces in his hair and on his body. The problem was ameliorated somewhat by the school routinely

feeding and bathing M.W., and giving him fresh clothes when he arrived each morning.

6. At the hearing the Department's witnesses conceded, and the evidence was clear, that the petitioner's problems administering M.W.'s medications were much less serious, and were quickly resolved.

7. The Department's witnesses also conceded that there was no medical evidence presented that the petitioner's care of M.W. posed any harm or risk of harm to him. The Department maintains that the petitioner's problems maintaining M.W.'s diet and personal hygiene constitute abuse and neglect *per se*.

8. This case differs from most other abuse and neglect findings in that virtually all the petitioner's actions, or lack thereof, happened in plain sight and with the full knowledge of virtually everyone involved in M.W.'s care, education, medical treatment and legal proceedings.

9. As noted above, M.W. attended school on a daily basis. At least as of April 2006, when the petitioner was appointed as his guardian, M.W. had a local attorney serving in an ongoing capacity as his guardian *ad litem*. As of July 2006 his special educator was a co-guardian for his medical care. The Department initiated its investigation in the

matter in October 2006. There is also no dispute that the Department closed an earlier investigation of the petitioner *without* substantiating abuse or neglect.

10. The record also shows that on November 28, 2006, a hearing was held in probate court concerning all the same issues that are the subject of the Department's subsequent substantiation of abuse and neglect. The parties agree that the hearing was the result of a petition filed by M.W.'s medical co-guardian to terminate or limit the petitioner's guardianship. The probate court issued an order in the matter on December 6, 2006.

11. In its "Findings of Fact" the probate court basically recited the same allegations made by the medical co-guardian at this fair hearing. In its "Conclusions of Law" the court determined *only* that the petitioner "must allow the co-medical guardian access to the ward and that (petitioner) must use all accessible health care services along with respite services for the care of the ward. . ."

12. The probate court made no specific findings or conclusions that M.W.'s health or welfare had been compromised. The petitioner's guardianship was continued with an "order" reiterating the petitioner's duties as guardian with a warning that the petitioner and the medical

guardian had until January 1, 2007 "to come to some agreement as (to) the care for the ward" or the court would "allow the petitioners (in that action) to petition the court for revocation of all or partial guardianship" of M.W., and the court would "place him in a place more suitable for his disability".

13. The Department does not dispute that the above order was not appealed and there is no indication that to date any other proceedings have been brought in any forum regarding the petitioner's continuing care and guardianship of M.W. The Department made its decision to substantiate the allegations of abuse and neglect by the petitioner in July 2007.

14. The Department's witnesses also conceded that the petitioner, herself, has noticeable limitations and situational and emotional problems that at times have hindered her ability to understand and provide optimal care for M.W. However, the Department also agrees and acknowledges, and the evidence fully supports, that the petitioner has always been concerned parent devoted to M.W.'s care and well being as best she understood it.

ORDER

The Department's decision substantiating abuse and neglect is reversed.

REASONS

The Commissioner of the Department of Disabilities, Aging and Independent Living (DAIL) is required by statute to investigate allegations of abuse, neglect and exploitation of vulnerable adults, and to keep those records that are "substantiated" in a registry under the name of the person who committed the abuse. 33 V.S.A. §§ 6906 and 6911(b). If a report has been substantiated, the person who has been found to have committed abuse may apply to the Human Services Board for relief that the report is not substantiated. 33 V.S.A. § 6906(d).

The statutes identified by the Department in its respective substantiations of "abuse" and "neglect" provide as follows:

(1) "Abuse" means:

(A) Any treatment of a vulnerable adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

* * *

(7) "Neglect" means purposeful or reckless failure or omission by a caregiver to:

(A)(i) provide care or arrange for goods or services necessary to maintain the health or safety of a vulnerable adult, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, unless the caregiver is acting pursuant to the wishes of the vulnerable adult or his or her representative. . .

As noted above, there is no evidence in this matter that the petitioner ever acted purposefully or recklessly to cause actual physical or medical harm to M.W. The evidence may be clear that she has at times been unable to fully appreciate the risks that a lack of hygiene and proper nutrition might pose to M.W. However, even if it could be concluded that her ongoing difficulties in this regard met the above definition of either abuse or neglect (which, in the Board's view, it cannot) all of the petitioner's representatives and caregivers, who clearly "allowed" M.W. to remain in the petitioner's care during this entire time, would be subject to the same conclusion. There is no indication that the Department has investigated any of them (or the probate judge, or its own investigator) for what clearly amounts to their ongoing complicity in M.W.'s situation.

The statutory purpose of the registry provision is set forth in 33 V.S.A. 6901 as follows:

The purpose of this chapter is to: protect vulnerable adults whose health and welfare may be adversely affected through abuse, neglect or

exploitation; provide a temporary or permanent nurturing and safe environment for vulnerable adults when necessary; and for these purposes to require the reporting of suspected abuse, neglect and exploitation of vulnerable adults and the investigation of such reports and provision of services, when needed; and to intervene in the family or substitute care situation only when necessary to ensure proper care and protection of a vulnerable adult or to carry out other statutory responsibilities.

If the petitioner is deemed to have abused or neglected M.W. during this period, what is the Board to make of the all the others, including the Department itself, who were fully aware of what was happening and failed to intervene in M.W.'s behalf? If there is a distinction in the above statutes between the responsibilities of the petitioner and those of his other caregivers¹ toward M.W., the Department has not indicated what that might be.

#

¹ See 33 V.S.A. § 6902(2).